Supreme Court U.S.
FILED
AUG 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5319

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAUL McNEIL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF IN RESPONSE TO PETITION

DONALD J. HANAWAY
Attorney General of Wisconsin

DAVID J. BECKER
Assistant Attorney General
of Wisconsin

Attorneys for Respondent.

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7447

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 1

ARGUMENT 2

THE PETITION FOR WRIT OF CERTIORARI FILED IN THIS CASE SHOULD BE GRANTED SO THIS COURT CAN RESOLVE THE CONFLICT BETWEEN THE WISCONSIN SUPREME COURT AND THE SEVENTH CIRCUIT COURT OF APPEALS ON THE ISSUE PRESENTED. 2

CONCLUSION 6

CASES CITED

Michigan v. Jackson,
475 U.S. 625 (1986) 3

State v. McNeil,
155 Wis. 2d 24, 454 N.W.2d 742 (1990) 2

United States ex rel. Espinoza v. Fairman,
813 F.2d 117 (7th Cir.),
cert. denied, 107 S. Ct. 3240 (1987) 3, 4, 5

CONSTITUTIONAL PROVISIONS

United States Constitution

Sixth Amendment 1, 2, 3

OTHER AUTHORITIES

Sup. Ct. R. 10.1(b) 3

No. 90-5319

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAUL McNEIL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF IN RESPONSE TO PETITION

SUMMARY OF ARGUMENT

The respondent, the State of Wisconsin, does not oppose the petition for certiorari filed in this case. The issue presented by the petition is whether a defendant who has invoked his sixth amendment right to counsel on one charge by appearing with counsel at an initial appearance on that charge may be subjected to police-initiated interrogation about other unrelated offenses while he is being held in continuous custody on the charged offense. In the decision of which certiorari review is sought, the Wisconsin Supreme Court held that such interrogation is permissible. In an earlier decision, expressly rejected by the Wisconsin Supreme Court in its decision in this case, the Seventh Circuit Court of Appeals

held that it is not. Review by this Court is necessary to resolve the conflict between the Wisconsin Supreme Court and the Seventh Circuit Court of Appeals and to provide definitive guidance to Wisconsin law enforcement officers and prosecutors, who need to know whether defendants who have invoked their sixth amendment right to counsel on one offense by appearing with counsel at a court proceeding relating to that offense may be interrogated about other unrelated offenses while they are being held in continuous custody.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI FILED IN THIS CASE SHOULD BE GRANTED SO THIS COURT CAN RESOLVE THE CONFLICT BETWEEN THE WISCONSIN SUPREME COURT AND THE SEVENTH CIRCUIT COURT OF APPEALS ON THE ISSUE PRESENTED.

Paul McNeil, the petitioner herein, has filed a petition for a writ of certiorari seeking this Court's review of the decision of the Wisconsin Supreme Court in his case: State v. McNeil, 155 Wis. 2d 24, 454 N.W.2d 742 (1990). The respondent, the State of Wisconsin, does not oppose the petition.

The issue presented by the petition is whether a defendant who has invoked his sixth amendment right to counsel on one charge by appearing with counsel at an initial appearance on that charge may be subjected to police-initiated interrogation about other unrelated offenses while he is being held in continuous custody on the charged offense. In its decision in this case, the Wisconsin Supreme Court held that such interrogation is permissible. In an earlier decision, expressly rejected by the Wisconsin Supreme Court

in its decision in this case, the Seventh Circuit Court of Appeals held that it is not. See United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.), cert. denied, 107 S. Ct. 3240 (1987).

This case thus falls squarely within the criterion guiding this Court's exercise of certiorari jurisdiction that is found in Sup. Ct. R. 10.1(b):

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

But the State of Wisconsin's decision not to oppose the petition for certiorari is not based on this case's abstract satisfaction of one of the legal criteria this Court has established to guide its exercise of certiorari jurisdiction. Rather, it is grounded on the very real practical consequences to effective law enforcement in Wisconsin that flow from the conflict this case creates between the State of Wisconsin's highest court and the Seventh Circuit Court of Appeals, whose decisions bind the federal courts in Wisconsin.

Under the conflicting decisions of the Wisconsin Supreme Court and the Seventh Circuit Court of Appeals, Wisconsin law enforcement officers have been placed in an extremely difficult position when they are called upon to decide whether to interrogate a criminal defendant who has invoked his sixth amendment right to counsel with respect to a charged offense by appearing with counsel at judicial proceedings relating to that offense. While the law is clear that no interrogation is permitted with respect to the charged offense, see Michigan v. Jackson, 475 U.S. 625 (1986), law enforcement

officers have been given diametrically opposed direction as to the propriety of interrogation about unrelated offenses. The Wisconsin Supreme Court has said such interrogation is permissible. The Seventh Circuit Court of Appeals has said it is not.

What is a Wisconsin law enforcement officer to do? If he follows the direction of the Wisconsin Supreme Court, he may succeed in eliciting admissions from the defendant that are critical to a successful prosecution of the crime he is investigating. A prosecution and conviction based on those admissions will survive challenge in the Wisconsin state courts under the Wisconsin Supreme Court's decision in this case. But the federal district court will, as a matter of course, grant habeas corpus relief to the defendant on the basis that the interrogation producing the critical admissions was obtained in violation of the Seventh Circuit's decision in Espinoza.

If, on the other hand, the officer follows the counsel of the Seventh Circuit Court of Appeals and declines to interrogate the defendant, he loses the only opportunity he may have to obtain the evidence he needs for a successful prosecution for the crime he is investigating. And, assuming the Wisconsin Supreme Court's decision in this case is correct, the opportunity will have been lost gratuitously; no constitutional mandate would have required the officer to forgo it.

The present state of the law thus presents Wisconsin law enforcement officers with a true dilemma when confronted with the situation with which this case and Espinoza deal. They can engage in the interrogation necessary to solve the crime they are

investigating and to convict the defendant of it, which Wisconsin's highest court has told them is constitutionally permissible, only to find the defendant's conviction set aside by the federal district court. Or they can forgo that interrogation with the concomitant risk that no successful prosecution of the person responsible for the crime they are investigating will be possible.

Wisconsin prosecutors face a similar dilemma when police officers have interrogated a charged defendant about an unrelated offense after he has invoked his right to counsel on the charged offense. At the trial of the unrelated offense, does the prosecutor use the incriminating statements produced by the interrogation, which the Wisconsin Supreme Court has said is constitutionally permissible, knowing that any conviction he obtains will be set aside by the federal district court under Espinoza? Or does he forgo use of the incriminating statements, and thus avoid the possibility of having the conviction set aside by the federal district court? If he chooses the latter course, he runs the risk of not obtaining a conviction at all because what may be the most compelling evidence of the defendant's guilt is not presented to the jury. That is a risk which he should not have to consider running, and to which the people of the State of Wisconsin should not be subjected, if the Wisconsin Supreme Court's decision in this case is correct.

There is only one way to resolve the dilemma facing Wisconsin law enforcement officers and prosecutors. That is for this Court to decide which decision is correct--the Wisconsin Supreme Court's in this case, or the Seventh Circuit Court of Appeals' in Espinoza.

For that reason, the State of Wisconsin does not oppose the petition for certiorari filed in this case. It should be granted to resolve the intolerable conflict that presently exists between the Wisconsin Supreme Court and the Seventh Circuit Court of Appeals on the issue presented.

CONCLUSION

For the reasons stated, the State of Wisconsin requests this Court to grant the petition for writ of certiorari filed in this case.

Respectfully submitted,

DONALD J. HANAWAY
Attorney General of Wisconsin

David J. Becker

DAVID J. BECKER
Assistant Attorney General
of Wisconsin

Attorneys for Respondent.

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7447

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DONALD J. HANAWAY
ATTORNEY GENERAL

Mark E. Musolf
Deputy Attorney General

Division of Legal Services
James D. Jeffries, Administrator
123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

David J. Becker
Assistant Attorney General
608/266-7447

August 16, 1990

Mr. Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Paul McNeil v. State of Wisconsin, No. 90-5319

Dear Mr. Spaniol:

Enclosed for filing in the above action please find twelve copies of the Brief in Response to Petition for Writ of Certiorari. Also enclosed is an affidavit of service.

Sincerely,

David J Becker

David J. Becker
Attorney for Respondent

DJB:jmw

Enclosures

cc: Gary M. Luck
Attorney at Law
839 North Jefferson Street
P.O. Box 93726
Milwaukee, Wisconsin 53202

RECEIVED
AUG
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 90-5319

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

PAUL McNEIL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

AFFIDAVIT OF SERVICE

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

JUDITH MARIE WADDELL, being first duly sworn, on oath deposes and says that on the 16th day of August, 1990, she served the Brief in Response to Petition for Writ of Certiorari to the Supreme Court of Wisconsin upon Gary M. Luck, Attorney at Law, attorney for petitioner, by depositing one copy of the same in a United States mail box, with first class postage prepaid, to him at the following address:

839 North Jefferson Street
P.O. Box 93726
Milwaukee, Wisconsin 53202

Judith Marie Waddell
JUDITH MARIE WADDELL

Subscribed and sworn to before me
this 16th day of August, 1990.

Denise J. Scheeling
Notary Public, State of Wisconsin
My Commission: expires 10/24/93